WHEN A LIBEL IS NOT A LIBEL

The frequently repeated saying that "the greater the truth the greater the libel," only related to criminal trials, and was meant to apply only to the charge made—thus, a charge of murder or treason was greater than a charge of robbery or a lesser offense. The truth was not a defense in criminal proceedings in England until 1847. In America it is a constitutional provision that the truth shall be a defense to libel in all cases.

In civil actions for damages the truth has always been a defense in England and in America.

There is no branch of the law that is generally as little understood and incapable of being defined by statute as is that of libel; yet it is the most frequent of application and as much in use for the good or ill of an individual or a community at large as any one of our constitutional liberties.

The bill of rights found in the constitution of each State provides "that every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right."

Thus the publisher as well as the accused, is protected from an abuse of the right. Actions for damages by individuals are resorted to for revenge as well as for profit. In such actions the burden of proof is on the defendant, who must prove his excuse for the publication and must show that it was made without malice. Thus he is always placed at a disadvantage before a jury. It is this disadvantage that exercises a principal restraint against the abuse of the press. The small recovery of damages is a protection to the press for trivial libels, while heavy damages are a penalty for a vicious and malicious publication.

The common law of England relating to libel and slander prevailed in America in civil actions for damages until about sixty years ago, when the new system of procedure in civil actions became popular, and extensively adopted. But the common law has undergone little change or improvement in England or America in other respects. It has never been defined in civil actions. No part of the law has undergone less change in the last two centuries than that relating to libel and slander.

The common law still prevails generally, with slight changes relating to procedure. It is founded on the wants and needs of the community, and is to enforce libel and slander suits as known

to the common law of England. It is intended for the enforcement and protection of rights, and for the protection and redress of wrongs.

Libel is mainly defined by judicial decisions, in criminal law and also in civil actions. In the codification of the criminal penal law in New York State, the definition of libel as recognized by the common law is defined as follows: "A malicious publication by writing, printing, picture, effigy, sign or otherwise than by mere speech, which exposes any living person, or the memory of any person deceased, to hatred, contempt, ridicule, or obloquy, or which causes, or tends to cause any person to be shunned or avoided, or which has a tendency to injure any person, corporation, or association of persons, in his or their business or occupation, is a libel.[1]

A publication having the effect or tendency mentioned is to be deemed (1) malicious, if no justification or excuse therefor is shown; (2) justified, when the matter charged as libelous is true, and was published with good motives and for justifiable ends; (3) excused, when it is honestly made in the belief of its truth and upon reasonable grounds for this belief, and consists of fair comments upon the conduct of a person in respect to public affairs, or upon a thing which the proprietor thereof offers or explains to the public.[2]

A communication made to a person entitled to or interested in the communication by one who was also interested in or entitled to make it, or who stood in such relation to the former as to afford a reasonable ground for supposing his motive innocent, is presumed under the codes not to be malicious, and is called a privileged communication.[3]

There are privileged publications that are allowed or excused in several instances.

An action, civil or criminal, cannot be maintained against a reporter, editor, publisher, or proprietor of a newspaper, for the publication therein of a fair and true report of any judicial, legislative, or other public and official proceedings, without proving actual malice in making the report. This does not apply to the

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[1] Penal Code, Sect. 242-51340. (It is substantially the same in every State, malice being presumed *prima facie* by the publication).

[2] This is merely a codification of the common law in civil and criminal cases.

[3] This is a fair codification of the common law relating to privileged communications.

libel contained in the heading of the report; or in any other matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of the public and official proceedings which was not a part thereof. The publication on its face must show the exemption. A fair statement of judicial proceeding is all that is allowed. It must not be garbled so as to produce misrepresentations, or by suppression of some portion of the evidence or proceedings to have the effect of giving a false or unjust impression, to the prejudice of the parties concerned. It need not be repeated verbatim, or embrace the entire proceedings, but may consist of an abridged or condensed statement thereof.[4]

Such matter is an absolute privilege, without regard to the truth of the matter. If it depended upon the truth, the privilege would be of no avail. The truth itself is an absolute defense and bar to a civil action in all cases without regard to the question of malice.[5]

Where the words complained of as libelous are ambiguous and the complaint contains no innuendo which would make them libelous, it fails to state a cause of action.[6] The libelous article must be capable of a certain application to the plaintiff, and may be shown by innuendoes in the pleading.

When a libel relates to one of several persons but does not specify to which, such persons cannot, by prosecuting an action for damages, put the defendants upon their defense and compel them to disclose to whom the libel referred.[7]

To impute to a professional man ignorance or want of skill in a particular transaction is not actionable without proving actual damage. To be actionable words of that character must be spoken or written of him generally.[8]

The class of publications, as well as the occasion and objects that render persons publishing them exempt from criminal liability, is all important in considering the liberty guaranteed to every citizen by the bill of rights, to publish his sentiments on all subjects, and be responsible for the abuse of that right. The abuse of the right is what the penal and the civil codes and the courts must be invoked to protect. The language of the courts

[4] *Salisbury v. Union Adv. Co.*, 45 Hun., 120.
[5] *Ackerman v. Jones*, 37 N. Y. Sup. Ct., 42.
[6] *Outcault v. Herald*, 117 App. Div. (N. Y.), 534.
[7] *Girard v. Beach*, 3 E. O. Smith (N. Y.), 337.
[8] *Garr v. Selden*, 6 Barb. (N. Y.), 416.

defining libel is very broad, but the exceptions allowed make its enforcement very complicated and frequently resorted to.

The basis of all civil actions is the claim for damages. There are three kinds of damages, actual, punitive and exemplary. They may all be sought and recovered in one action. The first must be alleged and proved the same as any other claim. Punitive damages are to punish the publisher, and exemplary damages are to warn him and others not to do likewise without danger of paying heavy damages.

The penal laws for criminal libel, which make it a misdemeanor, are seldom resorted to by parties claiming to be libeled; but personal libel suits for damages are now very frequent, hence the importance of knowing what kind of a publication makes the publisher liable for damages. He may be liable to a criminal prosecution, although not liable for damages in a civil action.

The most frequent publications complained of are those charging some crime, or misfeasance and malfeasance in office. These charges may be justified under the provisions of law applicable to the circumstances, which a jury may pass upon. Direct charges that the court will hold as a libel on its face without any extrinsic allegations are designated as libel *per se*. Where the crime charged is a misdemeanor it may not be a libel *per se*. Where the words, if true, would subject the plaintiff to an indictment, they are libelous. If they fall short of this test, they are not actionable unless special damage is alleged.

A misdemeanor is ordinarily not punishable by an infamous punishment; hence, in order that a charge of such offense may be actionable *per se,* it is necessary that it be indictable and involve moral turpitude. A charge of petit larcency is not a libel if false, unless it is a misdemeanor under the penal code.

Chancellor Kent said in *Store v. Cooper*[9]: "To sustain a private action for the recovery of a private compensation in damages for a false and unauthorized publication, the plaintiff in such action must either aver and prove that he has sustained some special damage from the publication of the matter charged against him; or the nature of the charge itself must be such that the court can legally presume he has been degraded in the estimation of his acquaintances or of the public, or has suffered some other loss either in his property, character or business, or in his domestic or social relations in consequence of the publication of such charge.

[9] 2 Denio, 298.

The provisions of the penal code should be considered to the full extent of their importance in civil actions for damages. As a general rule, a publication that the penal code allows or does not prohibit, cannot be made the basis of an action for damages without alleging and proving actual damages.

In all civil actions the question of libel or no libel, where it arises solely on the face of the publication, is a question of law for the court. The jury is bound to follow the instructions of the court in those cases.

There is one exception to the general rule of pleading and proof of special damage: it is that when the words impute unchastity to a woman actual damage and malice are presumed.

Criticism differs from defamation. It deals only with such things as invite public attention or call for public comment. It never attacks the individual, but only his work. Such work may be either the policy of the government, the action of a public officer, a public entertainment, a book published or a work of art exhibited. The comment must not go beyond the fair discussion of matters of public interest, and the judicious guidance of the public taste. The statement upon which the opinion is founded must be fair and true, and the opinion honestly expressed. The court must decide whether the matter commented on is one of public interest. If the court is of the opinion that there is some evidence that the statement is untrue or unfair, the jury must decide the case.[10]

It is said in *Gott v. Pulsifer* [11] that "The editor of a newspaper has the right, if not the duty, of publishing for the information of the public, fair and reasonable comments, however severe in terms, upon anything which is made by its owner a subject of public exhibition, as upon any other matter of public interest; and such a publication falls within the class of public communications for which no action can be maintained without proof of actual malice."

Chief Justice Cockburn said:[12] "I think the fair position in which the law can be settled is this: That where the public conduct of a public man is open to an animadversion and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct, so that the jury shall say that the criticism was not only honest but also well

[10] *South Hetton Coal Co. v. N. E. News Assn.* (1894), 2 Q. B., 140.
[11] 122 Mass., 235.
[12] *Campbell v. Spottiswoode,* 3 B. & S., 776.

founded, an action is not maintainable. But it is not because a public writer fancies that the conduct of a public man is open to the suspicion of dishonesty, he is therefore justified in assailing his character as dishonest."

A criticism denouncing plaintiff's work in the "Round Table" as "one of the worst stories that had been printed since Sterne, Fielding and Smollet defiled the literature of the already foul eighteenth century," that it "is not only tainted with this one foul spot, it is replete with impurity; it reeks with allusions that the most prurient scandal monger would hestitate to make," is a libel for a jury to determine. In this case, after a lengthy trial in New York City and able charge, the jury rendered a verdict of six cents damages.[13] The plaintiff alleged that he was greatly prejudiced in his credit and reputation as an author, and brought into public scandal, infamy and disgrace by the articles published in the "Round Table" by the defendant, criticising a book which had been published in America, on which the plaintiff was being paid a royalty. The "Round Table" was regarded by the literary world as of high standing. In charging the jury, the court (Mr. Justice Clark) said: "The most comprehensive freedom in animadverting upon the productions and actions of public men is essential to the very existence of civil and political liberty, and to the progress of civilization, and I heartily say with Lord Ellenborough, in *Zobart v. Zipper,*[14] Liberty of criticism must be allowed, or we should have neither purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication therefore I shall never consider libel which has for its object, not to injure the reputation of any individual, but to correct misapprehension of fact, to repute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality."

In *McAvoy v. Press Pub. Co.,*[15] the court said: "The defendant attempts to justify by claiming that as a matter of law the plaintiff was unfit to take or hold the office because he was a member of a political club, association, society and committee, and that this fact itself discredited him in the holding of the office. If this claim be well founded, then the article was not objectionable, because if as a matter of fact and law an officer is unfit to hold the office, a newspaper, no less than an individual, has the right to say

[13] *Reade v. Sweetzer,* 6 Abb., Pr. 9.

[14] I Campbell, 350.

[15] 114 App. Div. (N. Y.), 543.

so. Every citizen has the right to discuss the public acts of public men, and the legal qualification for office is a matter of concern to every citizen."

The distinction between an article censuring or satirizing an entire class or body of individuals, and one which aims defamatory statements at an individual, is well settled. The former may not be made the basis of an action for individual damages, the latter may.[16]

A municipal corporation cannot sue for libel, and an action does not lie by an officer of a regiment of militia for a publication reflecting on the officers of the regiment generally, without averring a special damage.[17]

In *Dooling v. Budget Pub. Co.*,[18] the court held that words relating merely to the quality of the article made, produced, furnished, or sold by a person, if false and malicious, are not actionable without special damage. To allege that an article of food contains benzoate of soda and is poisonous is not libelous, but a mere criticism, as it shows what the opinion is based on. Others might have a contrary opinion on the same state of facts.

The liberty of the press to honestly comment on and expose official misconduct exists in something more than name, and is not to be throttled, by threats or suits in the form of claims for damages instituted against publishers who call attention to such defaults and voice the public cry. Personal libel suits are now frequently resorted to by public officers for the purpose of intimidation, because the penal code will not meet their requirements. These public officers do not care to have the discussion or the criticism of their public matters by the press in the hands of a criminal court and jury.

Judge Cooley in his work on constitutional limitations says: "The newspaper press has become one of the chief necessities of our alert and commercial civilization. It bears its official relations to the government, national, State and local, and it comes nearer to the popular eye and heart than any other agency for influencing public opinion. In the main it recognizes the importance of these relations which have grown up between it and the communities it serves, and discharges the functions assigned it

[16] 184 Ct. of Appeals 483—approving *Ryckman v. Delavan*, 25 Wendell, 186.

[17] *Sumner v. Buel*, 12 John, 475.

[18] 144 Mass., 258.

with a dignity, sagacity, intelligence and enterprise not surpassed by laborers in other fields. It is a fact that the general disposition of juries in such cases, where the malice is a legal fiction and not a natural fact, is to deal leniently with the defendants. Verdicts of six cents damages are of common occurence. The significance of these verdicts is, that while the publisher has been guilty of a technical libel, his guilt was done in innocence and the plaintiff is not entitled to smart money."

The first article of the amendments to the Constitution provides that "Congress shall make no law abridging the freedom of speech, or of the press."

The law on this point is the same in England as it is in America. It was said by Baron Parke that "Every subject has a right to comment on those acts of public men which concern him as a subject of the realm, if he does not make his commentary a cloak for malice and slander."

Chief Justice Cockburn said: "Those who fill a public position must not be too thin-skinned in reference to comments made upon them. It would often happen that observations could be made upon public men which they knew from the bottom of their hearts were undeserved and unjust; yet they must bear with them and submit to be misunderstood for a time because all knew that the criticism of the press was the best security for the proper discharge of public duties."

Lord Brougham said: "The best security for a government like ours (a free government) and generally for the public peace and public morals, is that the whole community should be well informed upon its political as well as its other interests. And it can be well informed only by having access to wholesome, sound, and impartial publications."

Congress has never attempted to make any laws to abridge the freedom of speech or of the press.

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